United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2040. 652

RUDOLPH A. HASLER, ANTONIA B. TIPPETT, AND ALFRED A. HASLER, APPELLANTS,

vs.

ANNIE A. WILLIAMS, WILLIAM A. HASLER, LILLY A. PHILIPS, AND SARAH J. HASLER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JULY 8, 1909.

December 10, 1909

Ben Ordway A. J.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2040.

RUDOLPH A. HASLER, ANTONIA B. TIPPETT, AND ALFRED A. HASLER, APPELLANTS,

vs.

ANNIE A. WILLIAMS, WILLIAM A. HASLER, LILLY A. PHILIPS, AND SARAH J. HASLER, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 9, 1909.

In the Court of Appeals of the District of Columbia.

No. 2040.

RUDOLPH A. HASLER et al., Appellants,
vs.
ANNIE A. WILLIAMS et al.

a Supreme Court of the District of Columbia.

Equity. No. 28248.

RUDOLPH A. HASLER, ANTONIA B. TIPPETT, and ALFRED A. HASLER, Complainants,
vs.
ANNIE A. WILLIAMS, WILLIAM A. HASLER, LILLY A. PHILIPS, Sarah J. Hasler, John B. Larner, Trustee; Charles G. Emack, Trustee; August Donath, Trustee; Washington Loan and Trust Company, and Elizabeth G. Robbins, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill for Partition.*

Filed January 12, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28248.

RUDOLPH A. HASLER, ANTONIA B. TIPPETT, and ALFRED A. HASLER, Complainants,
vs.
ANNIE A. WILLIAMS, WILLIAM A. HASLER, LILLY A. PHILIPS, Sarah J. Hasler, John B. Larner, Trustee; Charles G. Emack, Trustee; August Donath, Trustee; Washington Loan and Trust Company, and Elizabeth G. Robbins, Defendants.

The petitioners, Rudolph A. Hasler, Antonia B. Tippett and Alfred A. Hasler, respectfully state to the Court as follows:

1. That the complainants herein, are all citizens of The United States; that the complainants Rudolph A. Hasler and Antonia B.

Tippett are residents of the District of Columbia, and that Alfred A. Hasler is a resident of Alaska; that all the complainants are of full age and bring this suit in their own right.

2. That all the defendants herein, and each of them are of full age and citizens of The United States, and your petitioners believe and therefore aver, are all residents of the District of Columbia; that the defendants Annie A. Williams, William A. Hasler, and Lilly A. Philips are the children of Rudolph Hasler, deceased, and are sued in their own right; that the defendant, Sarah J.
2 Hasler is the widow of said Rudolph Hasler, and is sued in her own right as the widow of said Rudolph Hasler; that the defendant John B. Larner, is sued as surviving trustee under a deed of trust to secure the payment of two thousand dollars ($2000) to Washington Loan and Trust Company, on land and premises described in paragraph 3 of this bill; that the defendant August Donath and Charles G. Emack are sued as trustees under a deed of trust to secure the payment of two thousand five hundred dollars, to Elizabeth G. Robbins on land and premises described in paragraph 3 of this bill.

3. That heretofore, to wit, on the 27 day of April, 1908, Rudolph Hasler departed this life in the City of Washington, District of Columbia, seized and possessed as owner by purchase in fee simple, subject to the two deeds of trust mentioned in paragraph- five and six of this bill, of the following described pieces and parcels of land and premises, situated and being in the City of Washington, District of Columbia, known and distinguished as and being:

Original lots numbered ten (10) and eleven (11), in square two hundred and ninety-seven (297) described as follows, viz: Beginning for the same on D Street, fifty-six (56) feet, three (3) inches East of the Southwest corner of said square and running thence East on said street twenty five (25) feet, thence north at right angles to said street one hundred (100) feet, thence west twenty-five (25) feet, thence south one hundred (100) feet to said street and the beginning, said property was acquired by purchase by said Rudolph Hasler on or about June 20, 1891.

The north thirty-eight (38) feet jointly by the depth
3 thereof of lot numbered eight (8) in square two hundred and sixty-three (263), said property was acquired by purchase by said Rudolph Hasler on or about March 6, 1891.

4. That said Rudolph Hasler, died intestate as far as concerns the land and premises described in paragraph three of this bill.

5. That the said Rudolph Hasler did heretofore, to wit, the fourteenth day of September, 1905, make and deliver his four (4) certain promissory notes, aggregating the sum of two thousand dollars ($2000.), payable to the order of the Washington Loan and Trust Company, three (3) years after date, and to secure payment of said notes, the said Rudolph Hasler, did execute jointly with the defendant, Sarah J. Hasler, a deed of trust recorded in Liber 3019, folio 382, to Albert A. Wilson, and John B. Larner, on land and premises known and distinguished as: Original lots numbered ten (10) and eleven (11), in Square two hundred and ninety-seven

(297) described as follows, viz: Beginning for the same on D street, fifty-six (56) feet, three (3) inches East to the Southwest corner of said square and running thence East on said street twenty-five (25) feet, thence North at right angles to said street one hundred (10) feet, thence West twenty-five feet, thence south one hundred (100) feet to said street, and the beginning. That your petitioners are informed and believe that five hundred dollars ($500.) of said trust has been paid and the balance of one thousand five hundred dollars ($1500.) is still unpaid.

4 6. That said Rudolph Hasler, did heretofore, to wit on the twenty-six day of May, 1897, make and deliver certain promissory notes, payable three (3) years after date, aggregating the sum of two thousand five hundred dollars ($2500.) payable to the order of Elizabeth G. Robbins, and to secure the payment of said notes, the said Rudolph Hasler, did jointly with the defendant, Sarah J. Hasler, execute a deed of trust recorded in Liber 2219 folio 102, to August Donath and Charles G. Emack, trustees, on land and premises known and distinguished as: the north thirty-eight (38) feet jointly by the depth thereof of lot numbered eight (8) in square two hundred sixty-three (263). That all of said two thousand five hundred dollars ($2500.) remains unpaid.

7. That the said Rudolph Hasler, left surviving him as his only children and heirs at law, Rudolph A. Hasler, Autonia B. Tippett, Alfred A. Hasler, Annie A. Williams, William A. Hasler and Lilly A. Philips, and Sarah J. Hasler, who is the widow of said decedent; that said Rudolph Hasler left surviving no other child or descendants or any deceased child or children.

8. That your petitioners are now seized in fee simple, together with the defendants, Annie A. Williams, William A. Hasler and Lilly A. Philips, as tenants in common of property hereinbefore described, subject to the dower interest of his widow Sarah J. Hasler, and the two deeds of trust hereinbefore mentioned; and that they claim said fee simple title to said property by descent from said Rudolph Hasler.

9. That said lands cannot be divided without loss or in-

5 jury to the parties interested and that it will be for the best interest and to the advantage of all the parties in interest that the said property and estate be sold, and that the money arising from such sale or sales, be divided among the parties, according to their respective interests and rights.

10. That considerable time will elapse before this cause can be heard and determined by this Honorable Court, and that the relief to which your petitioners are entitled, will thus long be deferred and the interests of your petitioners will be greatly imperiled and jeopardized and great loss will ensue by way of neglect of the property aforesaid, by reason of the failure to collect rents, and profits of the said property, unless this Honorable Court assumes the care and custody and supervision of this property pendente lite, and appoints a receiver or receivers to take charge of, protect, preserve and manage said property, to collect the rents, profits and income thereof.

The premises considered your petitioners pray as follows:

1. That a writ of subpœna may issue out of the Clerk's Office of this Honorable Court, directed to the defendants, Annie A. Williams, William A. Hasler, Lilly A. Philips, Sarah J. Hasler, John B. Larner, Trustee, Charles G. Emack, Trustee, August Donath, Trustee, Washington Loan and Trust Company and Elizabeth G. Robbins, commanding them and each of them to appear in this Honorable Court on a day to be therein named, to answer the exigencies of this petition.

6 2. That a decree may be passed in this cause, directing the land and premises described herein, to be sold and that a trustee or trustees may be appointed by this Honorable Court to make said sale and after paying all expenses of sale, that the proceeds of said sale may be divided among the parties to this cause in accordance with their respective interests.

3. That a receiver or receivers may be appointed to take charge of, protect, preserve and manage said property, and collect the rents, income and profits thereof, pending the final determination of this cause.

4. And for such other and further relief, as to the Court may seem just and proper.

RUDOLPH A. HASLER,
ANTONIA B. TIPPETT,
Petitioners.
ALFRED A. HASLER,
By His Attorney, WALTER C. BALDERSTON.

THOS. C. TAYLOR,
WALTER C. BALDERSTON,
Attorneys.

DISTRICT OF COLUMBIA, *ss:*

We, Rudolph A. Hasler, and Antonia B. Tippett, being first duly sworn, on oath depose and say that we have read the foregoing petition, by us subscribed and know the contents thereof; that the facts therein stated, upon our own personal knowledge, are true, and that those stated upon information and belief, we believe to be true.

RUDOLPH A. HASLER,
ANTONIA B. TIPPETT,
Petitioners.

7 Subscribed and sworn to before me this 9th day of January, 1909.

[SEAL.] WM. H. HOLLOWAY,
Notary Public, D. C.

8 *Joint Answer of Certain Defendants.*

Filed March 18, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28248.

RUDOLPH A. HASLER, ANTONIA B. TIPPETT, and ALFRED A. HASLER, Complainants,

vs.

ANNIE A. WILLIAMS, WILLIAM A. HASLER, LILLY A. PHILLIPS, Sarah J. Hasler, John B. Larner, Trustee; Charles G. Emack, Trustee; August Donath, Trustee; Washington Loan and Trust Company, and Elizabeth G. Robbins, Defendants.

The defendants, Annie A. Williams, William A. Hasler, Lilly A. Phillips and Sarah J. Hasler, for answer to so much and such parts of the bill of complaint in this cause exhibited against them and others as they are advised it is material, or necessary, for them to answer, answering say:

1 & 2. They are willing to admit for the purposes of this suit, paragraphs 1 and 2.

3. They admit that on the 27th day of April, 1908, Rudolph Hasler, died in the City of Washington, District of Columbia, seized and possessed of the property described in paragraph 3, and also other real estate not mentioned in said paragraph. They admit that the two parcels of real estate described in paragraph 3, were acquired by the said Rudolph Hasler on the dates mentioned in said paragraph.

9 4. In answer to paragraph 4, these defendants deny that the said Rudolph Hasler died intestate respecting the land and premises described in paragraph 3, of the bill, but, on the contrary, say that the said Rudolph Hasler left a last will and testament dated the 15th day of October, 1888, properly subscribed and witnessed, by which he devised unto the defendant, Sarah Hasler, his widow, all of his estate, real, personal and mixed. That said last will and testament has been filed with the Register of Wills of the District of Columbia, and a petition for the probate thereof has been filed in the Probate Court by the defendant, Sarah Hasler, being Administration cause No. 15265; that a certified copy of said will and testament is filed herewith as a part of this answer and marked defendants' Exhibit A.

5. These defendants believe to be substantially correct, the allegations of paragraph 5.

6. These defendants believe to be substantially correct the allegations of paragraph 6.

7. The defendants believe to be correct the allegations of paragraph 7.

8. These defendants deny that the petitioners have any interest in the property described in paragraph 8, of their bill, either as ten-

ants in common with certain of the defendants, or otherwise, but say that by virtue of said last will and testament of Rudolph Hasler above mentioned, title to said property is solely in the defendant, Sarah J. Hasler; that the defendant, Sarah J. Hasler, is in possession of said real estate, and has been for sometime past, and claims title thereto in virtue of the aforesaid will of her deceased husband, Rudolph Hasler.

10 9 & 10. They are advised that it is unnecessary for them to answer the allegations of paragraph 9, but in answer thereto repeat their denial that the complainants have any interest in the property made the subject of their bill, and are therefore not entitled to the partition thereof.

And, having fully answered the bill of complaint, they pray that they may be hence dismissed with their reasonable costs.

ANNIE A. WILLIAMS.
WILLIAM A. HASLER.
LILLY A. PHILLIPS.
SARAH J. HASLER.

HAYDEN JOHNSON,
W. W. BOARMAN,
For Def'ts.

DISTRICT OF COLUMBIA, *ss:*

We, Annie A. Williams, William A. Hasler, Lilly A. Phillips, and Sarah A. Hasler, being first duly sworn, on oath depose and say that we have read the foregoing answer by us subscribed and know the contents thereof; that the facts therein stated, upon our personal knowledge are true, and that those stated upon information and belief we believe to be true.

ANNIE A. WILLIAMS.
WILLIAM A. HASLER.
LILLY A. PHILLIPS.
SARAH J. HASLER.

11 Subscribed and sworn to before me this 18th day of March A. D. 1909.

[SEAL.] WM. H. HOLLOWAY,
Notary Public, D. C.

HAYDEN JOHNSON,
WM. W. BOARMAN,
Counsel for Defendants.

DEFENDANTS' EXHIBIT A.

Filed March 18, 1909.

In the name of God—Amen.

I, Rudolph Hasler, of the City of Washington in the District of Columbia, being of sound and disposing mind and memory, and considering the *the* uncertainty of this mortal life, do make, sign and seal and publish, this my last will and testament, hereby revoking

all former wills by me made in manner and form as follows, viz. My Executrix, hereinafter nominated and appointed, shall without unnecessary delay, after my decease, out of the personal property of which I shall die possessed, first pay the expense of my last illness, and my burial and secondly pay all debts justly owing by me at the time of my decease. All the rest, residue and remainder of my estate, real personal and mixed, I give, devise and bequeath unto my beloved wife Sarah Hasler, her heirs and assigns and I hereby nominate and appoint her Executrix of this my last will and testament.

12 In testimony of all of which I have hereunto set my hand this 15th day of October in the year of our Lord one thousand eight hundred and eighty eight.

RUDOLPH HASLER.

Signed, published and declared by Rudolph Hasler the within named testator as and for his last will and testament, in the presence of us, who at his request and in his presence, and in the presence of one another, have subscribed our names as witnesses thereto.

HORATIO BROWNING, JR., 1437 *L St. N. W.*
FRED C. GIESEKING, 1205 *M St. N. W.*
OLIVER T. THOMPSON, 475 *Md. Ave. S. W.*

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

On this 1st day of May, A. D. 1908, personally appeared William A. Hasler who on oath says that he does not know of any will or codicil of Rudolph Hasler (his father) late of said District, deceased, other than the foregoing instrument of writing dated October 15th, 1888; that he received the same from his mother Sarah Hasler and that said Rudolph Hasler died on or about the 27th day of April, 1908.

WILLIAM A. HASLER.

Sworn to and subscribed before me,

WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia, Clerk of Probate Court.

13 DISTRICT OF COLUMBIA, *To wit:*

I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify, That the foregoing is a true copy of the original paper writing purporting to be the last will and testament of Rudolph Hasler, deceased, filed in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court, in the matter of the estate of Rudolph Hasler, deceased.

Case No. 15,265, Adm. Doc. No. 38.

I further certify, That I have compared said copy with the original

paper in said office, and find it to be a full, true and correct transcript thereof.

Witness my hand and the seal of the said Probate Court, this 19th day of January, A. D. 1909.

[SEAL.] WM. C. TAYLOR,
Deputy Register of Wills for for *the District of Columbia, Clerk of the Probate Court.*

14 *Replication.*

Filed March 30, 1909.

In the Supreme Court of the District of Columbia, Holding Equity Court.

Equity. No. 28248.

RUDOLPH A. HASLER, ANTONIA B. TIPPETT, and ALFRED A. HASLER, Complainants,
vs.
ANNIE A. WILLIAMS, WILLIAM A. HASLER, LILLY A. PHILIPS, Sarah J. Hasler, John B. Larner, Trustee; Charles G. Emack, Trustee; August Donath, Trustee; Washington Loan and Trust Company, and Elizabeth G. Robbins, Defendants.

The complainants hereby join issue with the defendants Annie A. Williams, William A. Hasler, Lilly A. Philips and Sarah J. Hasler.

T. C. TAYLOR.
WALTER C. BALDERSTON.

15 *Opinion of Court.*

Filed April 21, 1909.

In the Supreme Court of the District of Columbia.

No. 28248. Equity.

RUDOLPH A. HASLER et al., Complainants,
vs.
ANNIE A. WILLIAMS et al., Defendants.

The complainants in this case are three of the surviving children of Rudolph Hasler, who died April 27, 1908.

The three defendants first named are also children of said decedent, and the defendant, Sarah J. Hasler, is his widow.

The bill is filed for the partition by sale of two pieces of real estate in this District, which were acquired by said Rudolph Hasler by purchase in 1891, after the execution by him of his will, dated October 15, 1888. Each piece of property is subject to a deed of trust to

secure an indebtedness of the said decedent; and the trustees and beneficiaries are made parties defendant in respect to the said encumbrances.

It is averred in the bill that the defendant Sarah J. Hasler is entitled to dower in the said property, subject to the said deeds of trust in which she had joined; and, subject to such dower and the said trusts, the bill avers the complainants and the three defendants first named, to be entitled to the said property by descent from their father Rudolph Hasler. It avers further that the property
16 cannot be divided between the said tenants in common without loss or injury, and they therefore ask for a sale, payment of the indebtedness secured, and a division of the surplus among the parties according to their several interests.

They aver that considerable time will elapse before this cause can be heard and determined, and that their interests will be imperiled and jeopardized thereby, and for that reason they pray for the appointment of a receiver to protect, preserve, and manage said property, and to collect the rents, profits, and income thereof, pending the sale, and determination of this cause.

The bill does not affirmatively aver that the defendant Sarah J. Hasler, the widow, is in possession of the property, but leaves it to be inferred from the facts which are averred.

The joint answer of the three children named as defendants, and the widow, Sarah J. Hasler, sets up a claim to the said property in the widow as devisee under the said will of Rudolph Hasler; and denies that the complainants have any interest whatever in the said property; and it also states that said Sarah J. Hasler is in possession of said real estate, and has been for some time past; and that she claims title thereto by virtue of the said will; and they file as an exhibit a certified copy of the said will.

The case was set down for hearing on the bill and answer, and counsel for the complainants contend that the will does not convey the said after-acquired property.

The language of the will is as follows:

"My executrix hereinafter nominated and appointed shall,
17 without unnecessary delay after my decease, out of the personal property of which I shall die possessed, first pay the expenses of my last illness and my burial, and secondly pay all debts justly owing by me at the time of my decease. All the rest, residue, and remainder of my estate, real, personal, and mixed, I give, devise, and bequeath unto my beloved wife Sarah Hasler, her heirs and assigns; and I hereby nominate and appoint her executrix of this my last will and testament."

By act of June 17, 1887, (24 Statutes-at-Large, 361), it was provided that "any will hereafter executed devising real estate in the District of Columbia, from which it shall appear that it was the intention of the testator to devise property acquired after the execution of the will, shall be deemed, taken and held to operate as a valid devise of all such property."

Section 1628 of the Code, as amended by act of June 30, 1902, changes the rule, as to wills executed thereafter.

It is claimed by counsel for the defendant that this will clearly

indicates that it was the intention of the testator to devise all the real estate and personal property owned by him at the time of his death to his widow; and it is argued that the words pertaining to personal property of which the testator shall die possessed, and the words all debts owing by him at the time of his decease, must also be construed as applying to the time when the mixed estate which constitutes the residue, shall become vested in his devisee,
18 and must therefore necessarily include the real estate then owned by him, no matter when it may have been acquired.

Before deciding this question, I think, under the allegation of the complainants, that the defendant, Sarah J. Hasler, is entitled to a dower right in the said property; that the bill can not at this time be maintained.

The Code provides that dower, in such case, shall be laid off and assigned before partition shall be decreed; (Code, Section 86), and according to Section 89, land in which the widow has a dower, can not be sold without her consent, but her dower should be laid off and assigned before sale is decreed.

The bill does not undertake to have dower assigned in any way, and does not show any consent of the widow to a sale and commutation of her dower interest; and it does appear that she is in possession, claiming title adversely to the complainants; and her refusal to consent to a sale must be assumed from the pleadings; so that at this stage of the case it would not be proper for the court to make any decree, either of partition in kind, or of partition by sale, although there was no question as to title.

The construction of this will, however, if it can be properly made in this case, will put an end to this litigation without any proceedings for the assignment of dower.

As stated by Chief Justice Marshall, in Smith v. Bell, 6 Peters, 68, the cardinal rule for the construction of a will, to which all other rules must bend, is that the intention of the testator, ex-
19 pressed therein, must prevail, provided it be consistent with the rules of law. This rule has been referred to and approved in many cases by the Supreme Court since it was announced in 1832.

It seems to me the question in this case has been answered, so far as this court is concerned, by the Supreme Court of the United S'ates, in the case of Hardenbergh v. Ray, 151 U. S., 112. The opinion in that case, which must control this court, closes with this sentence:

"It may therefore be laid down as a general proposition that where the testator makes a general devise of his real estate, especially by residuary clause, he will be considered as meaning to dispose of such property to the full extent of his capacity; and that such a devise will carry, not only the property held by him at the execution of the will, but also real estate subsequently acquired, of which he may be seized and possessed at the date of his death, provided there is testamentary power to make such disposition."

In the present case there can be no question but that the testator intended to convey all his estate, after payment of his debts and funeral expenses, to his wife; and it seems clear to my mind that the time contemplated by him when such will was to convey all of his estate was at the date of his death.

The will construed by the court in Hardenbergh v. Ray, had no such suggestive time mentioned therein as has the present will; notwithstanding which the court found the testator intended that his after-acquired estate should pass equally with that owned by him at the date of the will.

20 The law, as stated in said Section 1628 of the Code, provides that any will executed after June 30, 1902, which shall, by words of general import, devise all the estate, or all the real estate of the testator, shall be deemed, taken and held to operate as a valid devise of any real estate acquired by said testator after the execution of such will, unless it shall appear therefrom that it was not the intention of the testator to devise such after-acquired property.

It is clear that Rudolph Hasler did not intend to die intestate as to any property he might own at the date of his death; and when he made this will the law authorized him to devise any after-acquired property; and I must therefore hold that the title to the property sought to be partitioned in this case is vested by said will in the defendant Sarah J. Hasler, subject only to the encumbrances thereon, assuming the said will to be valid, and that it will be duly admitted to probate and record.

It follows from these conclusions that the bill must be dismissed.

JOB BARNARD, *Justice.*

21 *Decree Dismissing Bill.*

Filed April 29, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28248, Docket 62.

RUDOLPH A. HASLER et al., Complainants,

vs.

ANNIE A. WILLIAMS et al., Defendants.

This cause coming on to be heard upon bill and answer and being argued by counsel and considered by the Court, it is by the Court, this 29th day of April, 1909, adjudged, ordered and decreed, that the said bill be, and the same is hereby dismissed with costs.

JOB BARNARD, *Justice.*

Order for Appeal and Citation.

Filed May 4, 1909.

In the Supreme Court of the District of Columbia, the 4th Day of May, 1909.

Equity. No. 28248.

RUDOLPH A. HASLER et al.

vs.

ANNIE A. WILLIAMS et al.

The Clerk of said Court will note an appeal from the decree signed April 29" 1909 & issue citation.

WALTER C. BALDERSTON,
Attorney for Compl'ts.

22 In the Supreme Court of the District of Columbia.

No. 28248. In Equity.

RUDOLPH A. HASLER et al.
vs.
ANNIE A. WILLIAMS et al.

The President of the United States to Annie A. Williams, William A. Hasler, Lilly A. Philips, Sarah J. Hasler, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an Appeal noted in the Supreme Court of the District of Columbia, on the 4" day of May, 1909, wherein Rudolph A. Hasler, Antonia B. Tippett and Alfred A. Hasler are Appellants, and you are Appellees, to show cause, if any there be, why the Decree rendered against the said Appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 4th day of May in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Cl'k,*
By F. E. CUNNINGHAM,
Ass't Clerk.

Service of the above Citation accepted this 4th day of May, 1909.
HAYDEN JOHNSON,
Attorney for Appellee.

[Endorsed:] No. 28248. Equity. Rudolph A. Hasler et al., vs. Annie A. Williams et al. Citation. Issued May 4, 1909.

23 *Memorandum.*

May 21, 1909—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed June 18, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28248.

RUDOLPH A. HASLER et al., Complainants,
vs.
ANNIE A. WILLIAMS et al., Defendants.

The appellant hereupon designates the following parts of the record to be included in transcript to be transmitted to the Court of Appeals on the appeal taken and judged in this cause:

1. The original bill.
2. Answer of the defendants, Annie A. Williams, William A. Hasler, Lilly A. Philips and Sarah J. Hasler.
3. Replication.
4. Opinion of the Court.
5. Decree dismissing bill of complaint.
6. Notice of appeal, bond and approval.

T. C. TAYLOR,
WALTER C. BALDERSTON,
Attorneys for Complainants.

Copy of the aforegoing notice received this 14th day of June, 1909.

HAYDEN JOHNSON,
Attorney for Defendants.

24 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

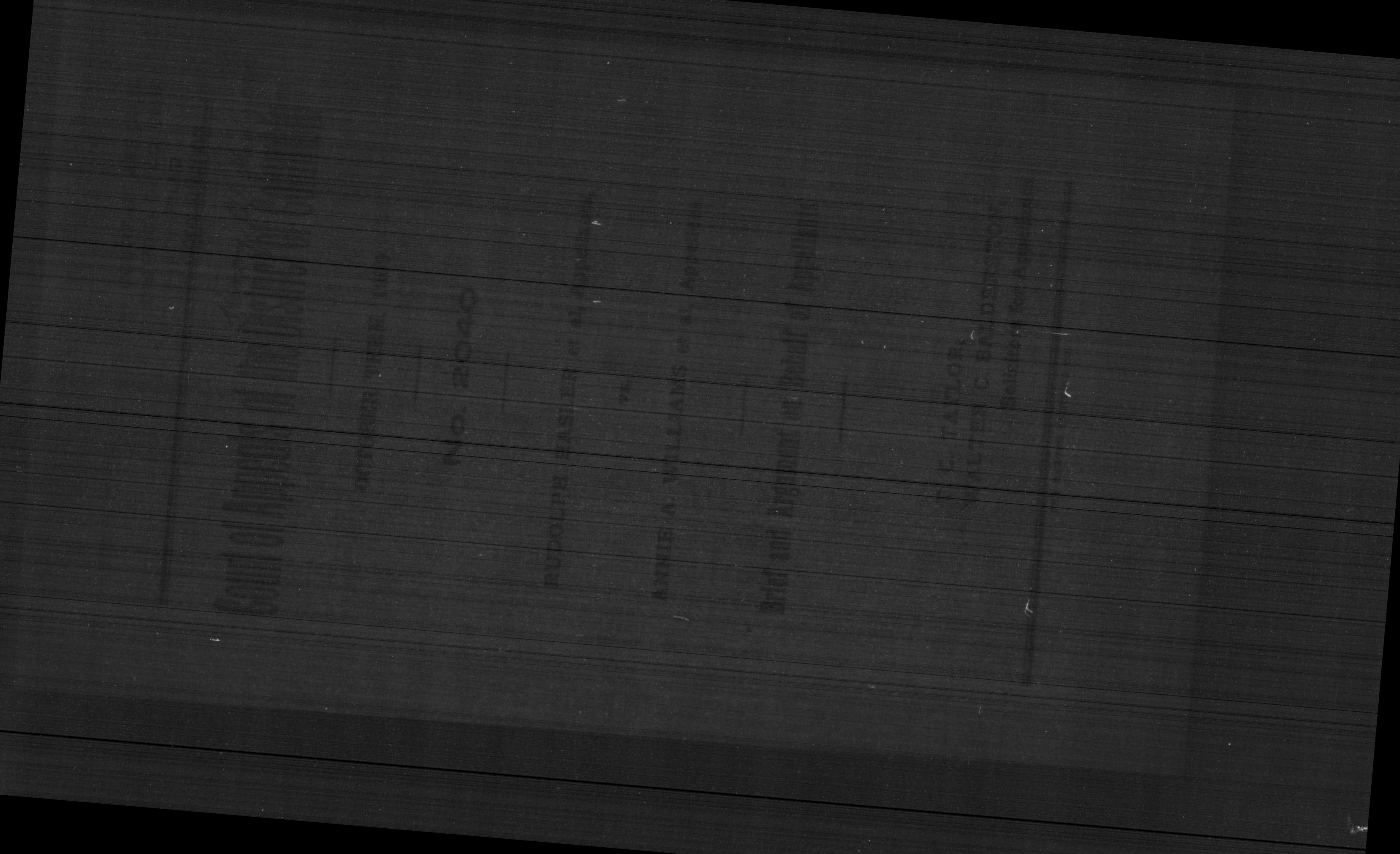
I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 23 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity Cause No. 28248, wherein Rudolph A. Hasler et al. are Complainants and Annie A. Williams et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of June A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 3040. Rudolph A. Hasler et al., appellants, vs. Annie A. Williams et al. Court of Appeals, District of Columbia. Filed Jul- 8, 1909. Henry W. Hodges, clerk.



In the Court of Appeals of the District of Columbia

October Term, 1909.

No. 2040.

RUDOLPH A. HASLER, ANTONIA B. TIPPETT, AND ALFRED A. HASLER,
APPELLANTS,

vs.

ANNIE A. WILLIAMS, WILLIAM A. HASLER, LILLIE PHILIPS AND SARAH J. HASLER,
APPELLEES.

Brief and Argument on Behalf of Appellants

STATEMENT OF FACTS.

April 27, 1908, Rudolph Hasler died, leaving a widow and six (6) children, all of whom are over twenty-one (21) years of age, said widow and children being parties to this cause; that he left a last Will and Testament dated October 15, 1888, the language of the will being as follows: "My executrix hereinafter nominated and appointed shall, without unnecessary delay after my de-

cease, out of the personal property of which I shall die possessed, first pay the expenses of my last illness and my burial, and secondly pay all debts justly owing by me at the time of my decease. All the rest, residue, and remainder of my estate, real, personal, and mixed, I give, devise, and bequeath unto my beloved wife, Sarah Hasler, her heirs and assigns; and I hereby nominate and appoint her executrix of this, my Last Will and Testament."

In the year 1891, after the execution of said will, the testator acquired by purchase the following land and premises, situate in the City of Washington, District of Columbia, original lots numbered ten (10) and eleven (11), in Square two hundred and ninety-seven (297), described as follows, viz: Beginning for the same on D Street, fifty-six (56) feet, three (3) inches, east of the southwest corner of said square, and running thence east on said street twenty-five (25) feet, thence north at right angles to said street one hundred (100) feet, thence west twenty-five (25) feet, thence south one hundred (100) feet to said street and the beginning; and said testator died seized and possessed thereof, subject to certain deeds of trust.

This suit was begun by three of the children of said testator in Equity Branch of the Supreme Court of the District of Columbia, praying for partition of the foregoing real estate.

Joint answer to the bill was filed by the three other children of the testator and his widow, claiming title to be in the widow as devisee under the will, dated October 15, 1888, and claiming that the widow is in possession under the will.

The case was set down for hearing on bill, answer and replication.

ASSIGNMENT OF ERRORS.

The Court erred:

1. In holding that the will passes after acquired real estate.

2. In holding that the bill cannot be maintained for partition by sale before dower is assigned.

3. In taking as true the new and distinct matter alleged in the answer of the defendants.

4. In dismissing appellant's bill.

ARGUMENT.

The Act of Congress January 17, 1887, (24 Statutes-at-Large, 361), provides as follows:

> "Any will hereafter executed, devising real estate in the District of Columbia, from which it shall appear that it was the intention of the testator to devise property acquired after the execution of the will, shall be deemed, taken and held to operate as a valid devise of all such property."
> * * *

The construction put upon this Act by this Court, is that, in order that a will pass after acquired real estate, it must affirmatively appear from the will, that it is the intention of the testator to do so. The intention must be clear and manifest, and rest on something more certain than mere conjecture. The Court must proceed on known principles and established rules; not on loose conjectural interpretation, nor consider what a person may be imagined to do in the testator's circumstances.

> Crenshaw *vs.* McCormick, 19 App., D. C., 495.
> Bradford *vs.* Matthews, 9 App., D. C., 438.

McAleer *vs.* Schnider, 2 App., D. C., 261.
Allen *vs.* Allen, 18 How., 385.
Smith et al. *vs.* Edrington, 8 Cranch., 67.

In the case of Crenshaw *vs.* McCormick, 19 App., D. C., 495, the question before the Court was whether the will passed after acquired real estate, the clause of the will being as follows:

> "All the rest of my estate and the residue of it of every description whatever, real, personal and mixed, I give, devise and bequeath to my sister, Mrs. Elizabeth Ricarda Crenshaw, to have and to hold the same absolutely and in fee simple, and I hereby constitute and appoint my said sister executrix of this, my last will and testament, and request and direct that she shall be allowed to qualify without giving security."

The Court held that after acquired real estate did not pass under the will.

The learned justice before whom the hearing was had below, cites, in his opinion, in support thereof the case Hardenbergh *vs.* Ray, 151 U. S., 112; but we respectively submit that the case does not support the appellees' contention, for the reason that the law of Oregon (the law of the State which must govern in that case), provided that the will of the testator passed all real estate owned by him at the time of his death, ***unless the contrary appeared from the will.*** But, under the law in force in the District of Columbia, at the time the testator Hasler made his will, the law was that the testator's will ***would not pass after acquired real estate, unless it appeared clearly and affirmatively from the will that such was his intention***—just the contrary to the law of the State of

Oregon, under the law which the case of Hardenbergh *vs.* Ray was decided. The law under which the case of Hardenbergh *vs.* Ray was decided was very similar to the law now in force in the District of Columbia, Sec. 1628 of the Code.

Assignment of widow's dower in this case is only one of the incidents of the partition suit, and dower may be set off and assigned in the same suit.

The Code provides by Sec. 86 * * *:

> "In all cases of partition between two or more joint tenants or tenants in common of real estate, in the whole of which a widow is entitled to dower, the said dower shall be laid off and assigned in like manner, before said partition shall be decreed. * * *"

Section 89 of the Code provides,

> "Whenever a decree is required for the sale of land, in the whole of which a widow is entitled to dower, if she will not consent to a sale of the said part of her dower, the Court may, if it appears advantageous to the parties, cause her dower to be laid off and assigned as aforesaid. * * *"

The law with reference to assignment of widow's dower as contained in the Code is in effect the same as the law was before the adoption of the Code. The Court of Equity now has, as it had before the Code, the power to assign a widow's dower in a ***partition*** suit without any separate proceeding for assignment of dower.

Chapter 51, Sect. 10, of Compiled Statutes in force in the District of Columbia, after providing how partition shall be made and for the appointment of commissioners for that purpose, provides as follows:

"That commissioners shall be, and they are hereby empowered and directed, to ascertain and lay off the widow's dower in and to land and tenements of the intestate by virtue of their commission, before they shall proceed to divide or value the lands, and the said commissioners shall make the assignment and location of such dower a part of their return to such commission; and the chancellor shall determine thereon and confirm or reject the same as in other cases under the said Act."

The case having been heard on bill, answer and replication, the Court was bound to take as true all allegations in the bill which the answer admitted to be true, but the Court was in error in accepting as true any matter set up in the answer by way of avoidance.

"It is an established rule of evidence in Equity, that where an answer which is put in issue, admits a fact, and insists upon a distinct fact by way of avoidance, the fact admitted is established, but the fact insisted upon must be proved; otherwise the admission stands as if the fact in avoidance had not been averred."

Hunter vs. Scruggs, 94 U.S. 22
Clements *vs.* Moore, 6 Wall., 315.

Respectfully submitted,

T. C. TAYLOR,
WALTER C. BALDERSTON,
Solicitors for Appellants.